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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PATRICIA HEWLETT,

Plaintiff and Appellant,

v.

J.P. MORGAN CHASE BANK, N.A., et  
al.,

Defendants and Respondents.

A152360, A153397

(San Francisco County  
Super. Ct. No. CGC17557112)

In these consolidated appeals, Patricia Hewlett challenges an order that declared her to be a vexatious litigant, an order that dismissed her lawsuit for failure to post a court-ordered bond, and an order striking her first amended complaint. We will affirm.

**I. FACTS AND PROCEDURAL HISTORY**

In December 2007, Hewlett obtained a \$245,650 loan (Loan) that was secured by a deed of trust against 3248 Shelter Creek Lane in San Bruno (Property). In August 2008, a Notice of Default and Election to Sell Under Deed of Trust was recorded against the Property, asserting that Hewlett was in default in the amount of \$11,672 and had failed to make a Loan payment since before May 2008. A Notice of Sale was recorded against the Property on December 18, 2008. Litigation ensued.

**A. Hewlett's Lawsuits Before This Case**

On December 31, 2009, Hewlett filed a pro per lawsuit in San Mateo County Superior Court (case number CIV490949), naming Chase Bank USA N.A.- Home Finance LLC as a defendant and asserting allegations relating to a modification of the

Loan (*Hewlett I*). After several demurrers, the trial court entered judgment against Hewlett in November 2011. Hewlett appealed, and the judgment was affirmed in January 2013. (*Hewlett v. Chase Bank USA N.A.* (Jan. 22, 2013, A134224) [nonpub. opn].)

A Notice of Sale filed in October 2013 indicated that the Property would be sold in November 2013 due to Hewlett's failure to pay \$41,496 to Shelter Creek Condominium Owners Association (Shelter Creek).

In November 2013, Hewlett filed a pro per complaint in San Mateo County Superior Court (case number CIV525391) against respondents herein, JPMorgan Chase Bank, N.A. (Chase), California Reconveyance Company (CRC), and Shelter Creek (*Hewlett II*). She asserted causes of action for wrongful foreclosure, fraud, and other claims relating to the Loan and Property, alleging that defendants had committed various wrongs including the commencement of foreclosure proceedings. Chase and CRC's demurrer to Hewlett's complaint was sustained without leave to amend, and judgment was entered against Hewlett.

At a nonjudicial foreclosure auction in November 2013, Shelter Creek purchased the Property. A trustee's deed upon sale transferring title to Shelter Creek was recorded in March 2014.

In June 2014, Hewlett filed another pro per complaint against Chase, CRC, and Shelter Creek in San Mateo County Superior Court (case number CIV528834) (*Hewlett III*). Hewlett asserted a quiet title claim, seeking a declaration that she had unencumbered title to the Property based on her assertion that "no Defendant has any right, title, estate, lien or interest whatever in the Property." Chase and CRC's demurrer was sustained without leave to amend on res judicata and collateral estoppel grounds. Judgment against Hewlett was entered in October 2014.

In February 2015, Hewlett filed yet another pro per lawsuit against Chase and CRC, asserting the same quiet title claim that she asserted in *Hewlett III* (*Hewlett IV*). The court sustained the demurrer of Chase and CRC on grounds of res judicata and collateral estoppel. Judgment was entered against Hewlett in May 2015. Hewlett

appealed, and the judgment was affirmed in October 2016. (See *Hewlett v. JPMorgan Chase Bank, N.A.* (Oct. 28, 2016, A145801) [nonpub. opn.] )

B. This Case

Hewlett filed this pro per action against Chase, CRC, and Shelter Creek in the San Francisco Superior Court in February 2017. She again asserted causes of action based on the Property's foreclosure, including claims for wrongful eviction, race discrimination, professional negligence, fraudulent conveyance and conspiracy.

In May 2017, Chase and CRC filed a motion under Code of Civil Procedure section 391 for an order declaring Hewlett a vexatious litigant and requiring her to post security. Chase submitted evidence that, within the prior seven years, Hewlett had filed or maintained twelve "litigations" in propria persona – five trial cases and seven appeals – all of which were determined adversely to her. Shelter Creek joined in the motion, Hewlett opposed it, and the matter was heard on July 11, 2017.

By written order on July 11, 2017, the court declared Hewlett a vexatious litigant "because in the immediately preceding seven-year period [she] has commenced, prosecuted, or maintained *in propria persona* at least five litigations other than in a small claims court that have been finally determined adversely." (Italics added.)

Pursuant to section 391.7, subdivision (a), the court entered a prefiling order prohibiting Hewlett from filing new pro per litigation without first obtaining leave from the presiding judge. The court also required Hewlett to "post a bond in the amount of \$50,000 for the benefit of Defendants within thirty (30) days of notice" of the order's entry, stayed the case until Hewlett posted the bond, and ordered that, "[i]f Plaintiff fails to post the bond within thirty (30) days of notice of entry of this Order, this matter will be dismissed."

Notice of the order's entry was served on July 11, 2017, so the deadline for Hewlett to post the bond was August 10, 2017.

On August 7, 2017, Hewlett filed a notice of appeal from the order deeming her a vexatious litigant and requiring the bond (appeal number A152360).

Hewlett failed to post the bond by August 10, 2017 or obtain a stay of her obligation to do so. Because she still had not posted the bond as of August 30, 2017, Chase and CRC gave notice that they would appear *ex parte* the next day to request that the case be dismissed under section 391.4.

On August 31, 2017, the court granted Chase and CRC's application for dismissal pursuant to section 391.4 and entered the dismissal "with prejudice, as to all Defendants: [Chase, CRC, and Shelter Creek]." Also on that date, Hewlett filed a First Amended Complaint.

On September 26, 2017, Hewlett filed a notice of appeal from the order dismissing the case (also filed in appeal number A152360).

Meanwhile, on September 25, 2017, Shelter Creek filed a motion to strike the First Amended Complaint. Chase and CRC joined in the motion. On October 27, 2017, the court granted the motion to strike.<sup>1</sup>

On November 22, 2017, Hewlett filed a third notice of appeal, appealing from the order striking her First Amended Complaint (appeal number A153397).

Chase and CRC filed a motion in this court to consolidate appeals A153397 and A152360 for all purposes. We granted the motion.

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<sup>1</sup> The July 2017 order determining Hewlett to be a vexatious litigant and requiring the posting of security under section 391.3 was not appealable, while the August 2017 dismissal was appealable. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 635.) Because Hewlett's August 7, 2018 notice of appeal from the order declaring her a vexatious litigant and requiring the bond was from a non-appealable order, it did not divest the trial court of jurisdiction to dismiss the case on August 31, 2018. (*Pazderka v. Caballeros Dimas Alang, Inc.* (1983) 62 Cal.App.4th 658, 666.) Nor did Hewlett's September 26, 2018 appeal from the dismissal divest the court of jurisdiction to strike the First Amended Complaint which, as discussed *post*, was improperly filed. (Code Civ. Proc. § 916, subd. (a) [trial court may proceed upon any matter not embraced in or affected by the appealed judgment]; *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938 [pendency of appeal does not preclude trial court from determining ancillary or collateral matters that do not affect the judgment on appeal].) Hewlett does not contend otherwise.

## II. DISCUSSION

### A. Vexatious Litigant

Under Code of Civil Procedure section 391, subdivision (b), a person is a vexatious litigant if, within the prior seven years, he or she “commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court” that were “finally determined adversely to the person.” (§ 391, subd. (b)(1).)<sup>2</sup> “Litigations” include “any civil action or proceeding, commenced, maintained or pending in any state or federal court,” and includes trial court actions as well as appeals and writ proceedings. (*McColm v. Westwood Park Ass’n* (1998) 62 Cal.App.4th 1211, 1219; § 391, subd. (a).) A voluntary dismissal, with or without prejudice, constitutes an adverse determination. (*Tokerud v. CapitolBank Sacramento* (1995) 38 Cal.App.4th 775, 779.)

Hewlett asserts “[t]he trial court did not accurately determine that Appellant came within the vexatious litigant statute because Respondents misrepresented that Appellant has had at least five litigations determined adversely against her within the most recent seven years.” She provides no citation to the record for this proposition. In any event, the court’s finding is supported by substantial evidence, as set forth *ante*.

In her reply brief, Hewlett urges that what appears to be 12 litigations are really only three cases – nine filings involving respondents, two filings in a bankruptcy proceeding, and a case against her attorney for malpractice. For purposes of section 391, however, the filings constitute 12 litigations. (See *McColm, supra*, 62 Cal.App.4th at p. 1219.)

Hewlett also cites *Roston v. Edwards* (1982) 127 Cal.App.3d 842. *Roston* reversed a vexatious litigant finding because it was supported by only one litigation within the meaning of the statute, since the other lawsuits were small claims cases,

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<sup>2</sup> Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

matters in which the litigant was a defendant or prevailed as a plaintiff, or proceedings that were not maintained within the prior seven years. (*Id.* at p. 847, fn. 2.) Not so here.

B. Dismissal for Failure to Post Security

A trial court must order a plaintiff to furnish “security” if, after hearing the evidence, “the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant.” (§ 391.3, subd. (a).) Here, after deeming Hewlett a vexatious litigant, the court imposed a bond requirement pursuant to section 391.3. Hewlett does not demonstrate that the security requirement was erroneously imposed.<sup>3</sup>

Section 391.4 states: “[w]hen security that has been ordered furnished is not furnished as ordered, the litigation *shall* be dismissed as to the defendant for whose benefit it was ordered furnished.” (Italics added.) It is undisputed Hewlett failed to post the bond by the August 10, 2017 deadline. Therefore, the court did not err in dismissing the case pursuant to section 391.4.

A heading in Hewlett’s opening brief on appeal asserts that the court “misapplied ... [section] 391.7(A) to dismiss appellant’s pending litigation.” (Capitalization omitted.) Section 391.7, subdivision (a) requires a vexatious litigant to obtain leave of the court’s presiding judge before filing *new* litigation in pro per. But here, the court did not dismiss

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<sup>3</sup> The trial court did not expressly find that Hewlett had no probability of prevailing in the litigation. Respondents make no mention of this, but they did assert in their motion that Hewlett had no probability of prevailing, and we may assume without contrary indication that the court implicitly reached that conclusion when it ordered Hewlett to furnish security. (See *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563.) In this appeal, Hewlett does not make any substantial or persuasive argument that she had any probability of prevailing. She makes the conclusory assertion that, as to her First Amended Complaint, “Appellant[’]s pleadings state causes of action supported by verifiable evidence.” But she does not explain *why* the allegations of any pleading were sufficient, particularly in light of the doctrines of res judicata and collateral estoppel. (See *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 217–218 [appellant must include factual analysis and legal authority to support the argument, or the argument will be deemed waived]; Cal. Rules of Court, rule 8.204(a)(1).)

her case under section 391.7; it dismissed it under section 391.4 due to her failure to post security as ordered.

Hewlett also contends “[t]he trial court should not be allowed to find inaccurately any litigant to be vexatious in order to dismiss the litigant’s filings that interferes with the citizen’s right to petition simply because the trial court does not want to be bothered with hearing the facts of the particular case.” She provides no citation to the record or argument supporting her position. The dismissal was based on her failure to file the bond, not the reason asserted by Hewlett.

Hewlett adds that the “trial court should not be allowed to dismiss Appellant’s pending litigation without a fair hearing,” citing *Roston*. She does not substantiate her argument and, as discussed above, *Roston* is distinguishable.

#### C. Order Striking First Amended Complaint

Respondents contend the order striking Hewlett’s First Amended Complaint is not appealable because the case, and all of Hewlett’s causes of action, were dismissed with prejudice on August 31, 2017. (Citing *Adohr Milk Farms, Inc. v. Love* (1967) 255 Cal.App.2d 366, 370 [order granting motion to strike is appealable if it “operate[s] to remove from the case the only cause of action alleged against the defendants”].) They further contend any error in striking the pleading will be moot if we affirm the orders that declared Hewlett a vexatious litigant and dismissed the case.

We analyze the matter differently. Although both the dismissal order and the First Amended Complaint were filed on the same day, it is not clear which one was filed first. If the First Amended Complaint was filed before the dismissal, it was filed in violation of the stay order. If it was filed after the dismissal, it was still filed without right or permission. In either event, since the dismissal was proper, there was no error in striking the First Amended Complaint. (See § 436, subd. (b) [a party may challenge, by motion to strike, “all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court”]; see *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528.)

In her reply brief, Hewlett urges that “if this court determines Respondents have misrepresented anything in this case, then this court should find the trial court’s order striking Appellant’s first amended complaint to be inaccurate.” She has not established that respondents made any misrepresentation that would render the striking of her First Amended Complaint erroneous.

Finally, in resolving this appeal, we have considered all the other arguments and assertions in Hewlett’s appellate briefing, including without limitation her claim that she did not default on the Loan and her contentions that she suffered miscarriages of justice including broken contractual promises, theft, breach of the implied covenant of good faith and fair dealing, discrimination, false promises, fraud, wrongful foreclosure, violation of her civil rights, and frivolous delay tactics. We find no reversible error.

### III. DISPOSITION

The orders are affirmed.



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NEEDHAM, J.

We concur.

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JONES, P.J.

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SIMONS, J.

(A152360, A153397)